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Adam S. Halpern

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Note

New York, Printz, and the Driver's Privacy Protection Act: Has Congress Commandeered the State Departments of Motor Vehicles?

by
ADAM S. HALPERN*

Introduction

On the morning of July 18, 1989, actress Rebecca Schaeffer answered the door of her Los Angeles apartment and was shot to death by a man she did not know. She was twenty-one years old. The gunman, an obsessive fan of Schaeffer, had obtained the actress's address from a private investigator, who in turn had paid the California Department of Motor Vehicles ("DMV") five dollars for it. The DMV's policy was to provide the address of any registered motorist to any California resident who asked for it, as long as the person making the request had either the motorist's license plate number or driver's license number, and could pay the five dollar fee.¹

Five years later, Congress responded to this and other abuses of motor vehicle records by passing into law the Driver's Privacy Protection Act² (hereinafter "DPPA" or "Act"). The Act prohibits state departments of motor vehicles and their agents from disclosing personal information obtained from motor vehicle records, except

* J.D. Candidate, Hastings College of the Law, May 2000. I would like to thank Professors Calvin Massey and Ash Bhagwat for guiding my research in a productive direction. Thanks are also due to my wife Lisa, who has involuntarily become an expert on constitutional federalism. Without her continuing support, this Note would not be possible.

1. *See Local Private Eye Led Suspect to Actress*, L.A. TIMES, July 21, 1989, at A1.

2. Driver's Privacy Protection Act of 1994, Pub. L. No. 103-322, tit. XXX, 108 Stat. 2099 (codified at 18 U.S.C. §§ 2721-2725).

under specified conditions. Specifically, States *must* disclose personal motor vehicle information in connection with safety, theft, and emissions programs, as well as for dealer recalls and advisories.³ States *may* disclose information for use by government agencies, including courts and law enforcement; by businesses to verify information submitted to them; in connection with litigation, including the service of process; in connection with research activities, including the production of statistical reports; by insurance companies to investigate claims; and for several other enumerated permissible uses.⁴ Beyond these enumerated permissible uses, however, States must not make personal motor vehicle information available.⁵ A State that refuses to comply is subject to a federal civil penalty of up to \$5,000 per day.⁶

Since the DPPA was enacted, four States have filed lawsuits challenging the constitutionality of the Act.⁷ The States argue that the Act requires them to enact regulations in order to enforce a federal policy, in contravention of the Tenth Amendment.⁸ In advancing this argument, the States rely heavily on two recent Supreme Court opinions. In *New York v. United States*,⁹ the Court held unconstitutional a provision of a federal statute requiring States to enact specific legislation to resolve a growing nationwide toxic waste problem.¹⁰ The Court relied on what has come to be known as the "anti-commandeering" principle, under which the federal government may not conscript a State's lawmaking authority to serve its own legislative agenda.¹¹ And in *Printz v. United States*,¹² the Court extended this principle to prohibit federal commandeering of a State's executive officers, striking down a provision of the Brady Handgun Law which required state law enforcement officers to conduct background checks of prospective gun purchasers.¹³ The

3. See 18 U.S.C. § 2721(b).

4. See *id.* § 2721(b)(1)-(14).

5. See *id.* § 2721(a).

6. See *id.* § 2723(b).

7. See *Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999) (Alabama); *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998) (Wisconsin); *Oklahoma ex rel Oklahoma Dept. of Pub. Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998) (Oklahoma); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (South Carolina), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1464).

8. The Tenth Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

9. 505 U.S. 144 (1992).

10. See *id.* at 188.

11. See *id.* at 161.

12. 521 U.S. 898 (1997).

13. See *id.* at 935.

States contesting the Driver's Privacy Protection Act argue that, like the statutes at issue in *New York* and *Printz*, the Act requires the States to "enact or administer a federal regulatory program."¹⁴

Each of the four suits has now reached its respective circuit court of appeals, and these courts are evenly divided on the constitutionality of the DPPA.¹⁵ To resolve the conflict among the circuits, the Supreme Court has granted certiorari in one of the cases.¹⁶ Oral argument is set for November 10, 1999, and a decision is expected in the spring.¹⁷ This Note will argue that the DPPA is a constitutionally valid legislative enactment under the anti-commandeering principle articulated by the Court in *New York* and *Printz*. In addition, this Note will question the constitutional legitimacy of the anti-commandeering principle. Part I reviews recent Supreme Court cases interpreting the Tenth Amendment. Part II applies these precedents to the DPPA, examining the cases litigated before the lower courts and concluding that the Act does not implicate the anti-commandeering principle. Part III concludes that the anti-commandeering principle enjoys little support in constitutional text, history, precedent, or policy, and is therefore highly suspect.

I. A Brief History of Federalism

A. Overview

Federalism refers to the set of issues that define the balance of power between the national government and the individual state governments in the United States. Specifically, federalism asks to what extent the Constitution permits the national government to exercise powers that before 1787 were held exclusively by the States.¹⁸ This Note examines one aspect of federalism: To what extent may Congress pass laws which potentially infringe on the sovereignty of the States?¹⁹ Those who advocate federalism-based limits on

14. *Id.* at 933 (quoting *New York*, 505 U.S. at 188).

15. See *Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999) (DPPA is unconstitutional); *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998) (DPPA is constitutional); *Oklahoma ex rel. Oklahoma Dep't of Pub. Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998) (DPPA is constitutional); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (DPPA is unconstitutional), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1464).

16. See *Condon*, 119 S. Ct. at 1753.

17. See Michael J. Collins, *Is the Driver's Privacy Protection Act a Valid Exercise of Congressional Power?*, PREVIEW OF UNITED STATES SUPREME COURT CASES, Oct. 20, 1999, available in WESTLAW, at 1999-2000 PREVIEW 72.

18. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 87, 88 (13th ed. 1997).

19. A separate aspect of federalism which has received much attention of late is the

congressional power argue that when Congress enacts laws which undermine the continuing vitality of the States as a part of our federal system, federal courts must intervene and hold these laws unconstitutional. For example, in *Coyle v. Smith*,²⁰ the Supreme Court ruled that Congress may not condition a State's entry into the union upon acceptance of Congress's chosen location for the state capital. Such an imposition would unduly interfere with powers that "essentially and peculiarly" belong to the States.²¹

Over the past sixty-five years, the debate over federalism has taken on increasing importance as two national values have come into conflict. The Framers of the Constitution envisioned a limited role for the federal government:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.²²

Many of the States relied on this vision, and on an explicit promise to create a Bill of Rights reserving powers to the States, when they ratified the Constitution.²³

On the other hand, one of the principal reasons the Framers drafted the Constitution was to permit the national government to regulate interstate commerce.²⁴ As the U.S. economy has grown from a local, agrarian economy into a truly national economy, the power to regulate interstate commerce has grown in proportion.²⁵ Today, few federal regulatory activities are beyond the reach of the Commerce Clause.²⁶ And once Congress has constitutional authority to enact a

extent to which courts may adjudicate the rights of States without the States' consent. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment bars such adjudication of individual lawsuits in federal court); *Alden v. Maine*, 119 S. Ct. 2240 (1999) (same in state court). These decisions, however, do not foreclose the enforcement of the Driver's Privacy Protection Act because they permit the United States to bring suit against a State without the State's consent. See *Alden*, 119 S. Ct. at 2267.

20. 221 U.S. 559 (1911).

21. *Id.* at 565.

22. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

23. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568-72 (1985) (Powell, J., dissenting).

24. The Constitution grants to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

25. The Court has interpreted this power to extend to purely intrastate activities, as long as they substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

26. See *Garcia*, 469 U.S. at 584 (O'Connor, J., dissenting). Justice O'Connor's assessment that virtually every activity falls within the commerce power may need to be

law, the States are bound by the Supremacy Clause²⁷ to follow it. Accordingly, absent some affirmative restraints on congressional authority to regulate, expanding federal power under the Commerce Clause threatens to overwhelm the Framers' intention that substantial lawmaking authority be reserved for the States.

Before 1976, the Supreme Court invalidated congressional enactments on federalism grounds only rarely, in cases of egregious violations.²⁸ As a leading commentator states, "[T]he conventional wisdom was that federalism in general—and the rights of states in particular—provided no judicially enforceable limits on congressional power."²⁹

B. *National League of Cities and Garcia*

In *National League of Cities v. Usery*,³⁰ the Court for the first time imposed a specific, affirmative limitation on Congress's exercise of the commerce power. The case concerned Congress's 1974 amendments to the Fair Labor Standards Act.³¹ The 1974 amendments extended the Act's minimum wage and maximum hour provisions to virtually all employees of the States and their political subdivisions.³² The Court held the amendments unconstitutional to the extent they "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions."³³ It rested its holding on the belief that the congressional enactments in issue "would impair the States' ability to function effectively in a federal system."³⁴

In the wake of this decision, the federal district courts and circuit courts of appeals were left to sort out what exactly constitutes a "traditional governmental function." The results were inconsistent.³⁵ The Supreme Court itself had difficulty articulating any plausible distinction between "traditional" and "non-traditional" governmental

modified slightly in light of *Lopez*.

27. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

28. See, e.g., *Coyle v. Smith*, 221 U.S. 559 (1911) (holding that Congress may not tell a State where it must locate its capital).

29. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 378 (2d ed. 1988).

30. 426 U.S. 833 (1976).

31. See Fair Labor Standards Act of 1938, 29 U.S.C. § 201, amended by Pub. L. No. 93-209, 88 Stat. 55 (1974).

32. See *National League of Cities*, 426 U.S. at 836.

33. *Id.* at 852.

34. *Id.* (citation and internal quotation omitted).

35. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538-39 (1985) (collecting cases from lower courts).

functions.³⁶ In response to this difficulty, and less than nine years after it had first announced substantive affirmative limits on congressional authority to encroach on areas of traditional state concern, the Court abandoned the "traditional/non-traditional" distinction.

In *Garcia v. San Antonio Metropolitan Transit Authority*,³⁷ the Court overruled *National League of Cities*, reinstating Congress's extension of the Fair Labor Standards Act to state employees generally. It specifically disavowed any test of constitutionality "that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"³⁸ However, it declined to replace the fallen standard with any other specific, affirmative limit on Congress's power to regulate States under the Commerce Clause. Instead, the Court concluded that the fact of their representation in Congress would serve as the States' protection from congressional overreaching. As the majority stated, "[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through State participation in federal governmental action."³⁹ The Court did, however, leave open the possibility that the Constitution might impose some affirmative limits on the commerce power.⁴⁰

C. *New York* and *Printz*

Seven years later, the Court imposed one such affirmative limitation in *New York v. United States*.⁴¹ In response to a severe shortage of disposal sites for low-level radioactive waste, Congress passed into law in 1985 a series of three incentives designed to spur the States to action.⁴² The third incentive required each State on January 1, 1996, to take possession of all such waste generated within its borders, if the State had not passed a law providing for its disposal by that date.⁴³

36. *See id.* at 539-40.

37. 469 U.S. 528 (1985).

38. *Id.* at 546-47.

39. *Id.* at 556.

40. *See id.*

41. 505 U.S. 144 (1992).

42. *See id.* at 150-51. In 1979, after shutdowns of several facilities, only one disposal site (in South Carolina) remained operational in the entire United States. At the urging of the National Governors Association ("NGA"), Congress passed a law in 1980 encouraging the States to act, but imposing no penalties for States that failed to do so. By 1985 few States had taken steps to provide for the disposal of their low-level radioactive waste. That year, again at the urging of the NGA, Congress passed the incentives into law. *See id.*

43. *See id.* at 153-54.

In striking down this third incentive under the Tenth Amendment, the Court articulated what has come to be known as the "anti-commandeering" principle.⁴⁴ Simply stated, this principle prohibits the federal government from "commandeering" a state government by directly requiring it to enact a federally mandated program.⁴⁵ If Congress wishes to regulate the activities of individuals, it must enact the legislation itself, rather than demanding that the States do so. In the words of Justice O'Connor, "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."⁴⁶ The third incentive failed this constitutional test. Congress could not direct a State to take possession of the waste generated within its borders,⁴⁷ nor could it require the State to pass a law providing for the disposal of such waste. Each of these alternatives involved the proscribed commandeering of the State's legislative function by the federal government. And forcing a State to choose between two unconstitutional alternatives was itself unconstitutional.⁴⁸

The Court reaffirmed and extended the anti-commandeering principle in *Printz v. United States*.⁴⁹ At issue was an interim provision of the Brady Handgun Violence Prevention Act⁵⁰ requiring the chief local law enforcement officer (generally the sheriff) of a prospective gun purchaser's county of residence to reasonably investigate that individual's background so as to verify that such a purchase would not violate the law.⁵¹ The Court struck down the provision under the Tenth Amendment. Writing for a 5-4 majority,⁵² Justice Scalia held: "The Federal Government may [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."⁵³ Thus, just as *New York* prohibits federal commandeering of a State's legislative processes, *Printz* prohibits federal commandeering of its executive officials as well.

The Supreme Court has issued no further opinions addressing the issue of federal commandeering of state governmental functions.

44. See *id.* at 161-66, 177.

45. See *id.* at 161.

46. *Id.* at 178.

47. Ordering a State to accept such liabilities would be equivalent to ordering the State to legislate direct subsidies to waste producers. See *id.* at 175.

48. See *id.* at 175-76.

49. 521 U.S. 898 (1997).

50. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

51. See *Printz*, 521 U.S. at 902.

52. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. See *id.* at 900.

53. *Id.* at 935.

Accordingly, the current state of Tenth Amendment jurisprudence stands as follows. Under *Garcia*, the States' principal protection from congressional intrusion into matters of state sovereignty lies in the political process, in the fact of their representation in the federal government. By definition, courts lack the power to enforce such a political limitation. However, under *New York* and *Printz*, the anti-commandeering principle imposes a judicially enforceable, procedural restraint upon Congress. While the federal government has broad power under the Commerce Clause to directly regulate the behavior of its citizens, it may not administer its regulatory program by conscripting state legislatures or officers as its agents.

II. The Driver's Privacy Protection Act Does Not Violate the Anti-Commandeering Principle

Part I summarized the leading Tenth Amendment cases decided by the Supreme Court. This part applies those teachings to the DPPA. I conclude that the Act is constitutional under current law.⁵⁴ Although it directly regulates the States, it does not do so in the manner prohibited by the Tenth Amendment. I begin by examining the lower federal court decisions interpreting the Act.

A. Two Circuits Uphold the DPPA

Both the Seventh and Tenth Circuits have held the DPPA constitutional under existing Tenth Amendment jurisprudence. In *Travis v. Reno*,⁵⁵ the Seventh Circuit held that the Act "is within the commerce power and compatible with constitutional principles of federalism."⁵⁶ Wisconsin argued that the Act, like the statutes struck down in *New York* and *Printz*, impermissibly commandeers the State's governmental apparatus because it requires the State to adopt new regulations in order to comply.⁵⁷ The court rejected this argument, distinguishing federal laws that conscript state governments as agents from those like the DPPA that simply demand

54. Scholars have criticized the *Printz* decision on various grounds. See, e.g., Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (arguing that the formalist approach adopted by the *Printz* majority rests ultimately on unsupported ad-hoc judgments, rendering the *Printz* opinion unpersuasive). However, Part II will proceed from the assumption that *Printz* and *New York* are the law and will address only the question whether the DPPA is constitutional when considered in light of these previous Court decisions. For an extended discussion of the constitutional validity of the anti-commandeering principle developed by the Court in *New York* and *Printz*, see *infra* Part III.

55. 163 F.3d 1000 (7th Cir. 1998).

56. *Id.* at 1001-02.

57. See *id.* at 1003.

compliance.⁵⁸ Writing for the court, Judge Easterbrook noted,

[F]ederal law pervasively regulates states as marketplace participants; the anti-commandeering rule comes into play only when the federal government calls on the states to use their sovereign powers as regulators of their citizens. Because the Driver's Privacy Protection Act affects states as owners of data, rather than as sovereigns, it does not commandeer states in violation of the Constitution.⁵⁹

Similarly, in *Oklahoma ex rel. Oklahoma Department of Public Safety v. United States*,⁶⁰ the Tenth Circuit found that the DPPA does not violate the anti-commandeering principle. The court noted that the Act does not require States to legislate according to a federal agenda, but instead directly regulates the behavior it wishes to proscribe.⁶¹ Neither does the Act direct state officials to enforce it, but instead provides its own federal enforcement mechanisms.⁶² "Unlike [the statutes at issue in] *New York* and *Printz*, the DPPA does not affect any unique government function, such as the state legislative process or state law enforcement activities."⁶³

Both the Seventh and Tenth Circuit opinions relied on *South Carolina v. Baker*⁶⁴ as controlling precedent.⁶⁵ At issue in *South Carolina* was a provision of a 1982 federal tax statute that removed the federal tax exemption on interest earned on state and local bonds, unless those bonds were issued in registered form.⁶⁶ By stipulation of the parties, however, the Court treated the statute as if it simply prohibited the States from issuing unregistered bonds.⁶⁷

South Carolina argued that Congress may not require the States to issue its bonds in a particular form, because such an action "commandeers the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme."⁶⁸ The Court replied that a law requiring such actions on the part of the State does not constitute the type of commandeering that the Constitution proscribes.⁶⁹ Justice Brennan wrote: "Any federal regulation demands compliance. That a State wishing to engage in certain

58. *See id.* at 1004-05.

59. *Id.*

60. 161 F.3d 1266 (10th Cir. 1998).

61. *See id.* at 1272.

62. *See id.*

63. *Id.*

64. 485 U.S. 505 (1988).

65. *See Travis*, 163 F.3d at 1004; *Oklahoma*, 161 F.3d at 1270, 1272.

66. 485 U.S. at 507-08.

67. *See id.* at 511.

68. *Id.* at 513.

69. *See id.* at 514.

activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."⁷⁰

B. Two Circuits Strike Down the DPPA

In contrast to the Seventh and Tenth Circuits, the Fourth and Eleventh Circuits have found the Driver's Privacy Protection Act unconstitutional. In *Condon v. Reno*,⁷¹ the Fourth Circuit held that Congress, in passing the DPPA, exceeded its commerce power insofar as that power is constrained by the Tenth Amendment. The court conceded that the DPPA neither commandeers the State's legislative process nor conscripts the State's officers,⁷² but nevertheless found the Act invalid. It cited *New York* for the proposition that "Congress may only subject state governments to generally applicable laws."⁷³ As opposed to "a law of general applicability that incidentally applies to the States," the DPPA "for all intents and purposes, applies *only* to the States," and is therefore unconstitutional.⁷⁴

The Fourth Circuit's opinion misconceives *New York*. True, the Court in *New York* drew a distinction between generally applicable federal laws which apply incidentally to the States and federal laws which improperly commandeer the States.⁷⁵ But the Court never suggested that federal laws which apply only to the States were per se invalid, as the Fourth Circuit infers. *New York* established nothing more than that Congress may not direct the States to enact specific legislation. The *New York* Court struck down the act in question because it "commandeer[ed] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program . . . an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution."⁷⁶ As the Fourth Circuit concedes, the DPPA does not similarly commandeer the state legislatures.⁷⁷

The Eleventh Circuit's opinion in *Pryor v. Reno*⁷⁸ merits more serious attention. Here, too, the court calls attention to the distinction between laws of general applicability and laws targeted

70. *Id.* at 514-15.

71. 155 F.3d 453 (4th Cir. 1998).

72. *See id.* at 460.

73. *Id.* at 456 (internal quotation omitted; citing *New York v. United States*, 505 U.S. 144 (1992)).

74. *Id.*

75. *See New York v. United States*, 505 U.S. 144, 160-61 (1992). For a criticism of the validity of this distinction, see *infra* text accompanying notes 127-34.

76. *Id.* at 176 (citation and internal quotation omitted).

77. *See Condon*, 155 F.3d at 460.

78. 171 F.3d 1281 (11th Cir. 1999).

exclusively at States.⁷⁹ However, the court's focus is on the administrative burdens the States must bear in obeying the provisions of the DPPA.

The Eleventh Circuit begins its opinion by describing in minute detail the circumstances under which the Act prohibits, permits, or requires a State to release information contained in its motor vehicle records.⁸⁰ The extent of this detail then becomes the centerpiece of the court's holding. Because the DPPA delineates the exact circumstances under which States may release their data, the court comprehends the Act to direct state officials to administer a federal regulatory scheme:

[T]he DPPA does establish a detailed set of rules under which Alabama's disclosure or refusal to disclose to third parties the personal information in its motor vehicle records shall be done as the federal establishment wishes it to be done. . . .

. . . State officers are *directed* to administer and enforce these rules.⁸¹

But the applicability of the anti-commandeering principle does not hinge on the complexity of the federal law at issue or on the level of burden the regulation imposes upon the States. A congressional enactment either commandeers the State's governmental apparatus or it does not. As Justice Scalia made clear in *Printz*, such commandeering is per se invalid:

[W]here, as here, it is the whole *object* of the law to direct the functioning of the state executive . . . a "balancing" analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.⁸²

The constitutional yardstick by which the DPPA is measured is not the extent of the Act's burden on state officials, but whether that burden constitutes the commandeering of the state executive which *Printz* forbids.

C. The DPPA Demands States' Compliance, Not Their Administrative Assistance

Printz thus makes clear that federal legislation may impose burdens upon the States only if those burdens do not amount to commandeering, that is, directing the States to enact or administer a federal regulatory program. In this regard, a State's obligation to follow federal law is not the type of administrative burden proscribed

79. See *id.* at 1286-87.

80. See *id.* at 1282-84.

81. *Id.* at 1285-86.

82. *Printz v. United States*, 521 U.S. 898, 932 (1997) (footnote omitted).

by *Printz*. While the burdens the DPPA imposes are no doubt real, they are the burdens of *compliance*, not the burdens of *administration*. Every federal law that regulates the behavior of the States imposes administrative burdens upon the state government, including its officials and its agencies, in conforming the State's activities to the standards set forth in the federal regulatory scheme. If the DPPA is unconstitutional because it imposes these administrative burdens, many other federal laws must be similarly unconstitutional.⁸³

The Supreme Court observed in *South Carolina*⁸⁴ that federal laws demand compliance. When those laws regulate the behavior of States, States will be required to take administrative action to comply with federal standards.⁸⁵ This observation applies with equal force to the Driver's Privacy Protection Act as to the prohibition on unregistered state and municipal bonds at issue in *South Carolina*. Like the prohibition on unregistered bonds, the prohibition on the release of motor vehicle records requires state action in compliance. Also like the prohibition on unregistered bonds, the prohibition on the release of motor vehicle records "presents no constitutional defect."⁸⁶ There simply is no principled distinction between the DPPA and the federal taxation statute at issue in *South Carolina*.

One may, however, legitimately question whether after *Printz*, *South Carolina* is still good law.⁸⁷ But while the *South Carolina* decision predates the current Court, the reasoning behind the *South Carolina* holding remains persuasive. If any federal law that requires States to take administrative action in compliance is unconstitutional because it commandeers state governments, then "any State could immunize its activities from federal regulation by simply codifying the

83. See *Travis v. Reno*, 163 F.3d 1000, 1003-04 (7th Cir. 1998) (noting that if DPPA unconstitutionally commandeers state government, so does the Fair Labor Standards Act, which imposes recordkeeping and compensation requirements to which States must adapt). See also Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(b) (citing other federal laws which mandate disclosure of certain motor vehicle information. If the DPPA is struck down for commandeering, these federal statutes must also fall, for they also direct state agencies to disclose information in certain circumstances.).

84. *South Carolina v. Baker*, 485 U.S. 505 (1988).

85. See *id.* at 514-15.

86. *Id.* at 515.

87. Chief Justice Rehnquist and Justice Scalia concurred only in the judgment in *South Carolina*, and Justice O'Connor dissented. Justice Kennedy took no part in the decision. Moreover, Justice Brennan's pronouncements on the scope of congressional power have not fared particularly well during this Court's tenure. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988) (Brennan, J., plurality opinion), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Brennan, J.), *limited by City of Boerne v. Flores*, 521 U.S. 507, 527-29 (1997).

manner in which it engages in those activities.”⁸⁸ Such a result is incompatible with our constitutional design. While States retain a substantial degree of sovereignty under the Constitution, they are not co-equal sovereigns with the national government.⁸⁹ Instead, federal law is still “the supreme Law of the Land.”⁹⁰ Any extension of the anti-commandeering principle which States could invoke to avoid complying with federal law would seriously undermine the Supremacy Clause, and therefore the Constitution.

Looking at the issue from a slightly different angle, Congress must have some means of carrying into action its enumerated powers, in this case the commerce power. No one disputes that the Commerce Clause reaches the release of personal information to national and multinational companies. No one disputes that, but for the anti-commandeering principle, Congress has the authority to regulate the release of such information, whether the regulated entity be a State or a private company. If direct regulation of the States constitutes improper commandeering, how then is Congress to exercise its acknowledged power and prevent state departments of motor vehicles from releasing personal information from their databases just as it would prevent private entities from so doing?⁹¹ The Constitution cannot be interpreted in a way that renders an enumerated Article I power a nullity.

Accordingly, the Driver's Privacy Protection Act of 1994 does not commandeer the States in violation of the Tenth Amendment. And besides the anti-commandeering principle, the States' only protection from Congressional overreaching lies in the political process itself.⁹² Since the political process produced the DPPA, and the Act does not commandeer the States, the Act must be constitutional under current law as interpreted by the Supreme Court.

III. Should There Be an Anti-Commandeering Principle?

Having concluded that the anti-commandeering principle does not render the Driver's Privacy Protection Act unconstitutional, I turn now to the question whether the anti-commandeering principle is constitutionally valid.

88. *South Carolina*, 485 U.S. at 515.

89. See *Caminker*, *supra* note 54, at 206-07.

90. U.S. CONST. art. VI, cl. 2.

91. In contrast, Congress had a simple alternative to its conscription of the States' chief law enforcement officers when it enacted the Brady Handgun Violence Prevention Act, at issue in *Printz*. Practical difficulties aside, Congress could have required federal officials to conduct the background checks.

92. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

A. Anti-Commandeering Enjoys Little Support in Constitutional Text, History, or Precedent

Sound constitutional analysis must necessarily begin with the text of the Constitution. That document contains no language that, either explicitly or by inference, prohibits Congress from ordering the States to pass legislation. While some might read such a limitation into the Tenth Amendment, the Court frankly admits that the powers "reserved" to the States under that amendment are merely those that the Constitution has not seen fit to confer upon the federal government. "[T]he Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'"⁹³

In *Printz*, the Court stated that a law that commandeers the States is not "necessary and proper for carrying into Execution" the commerce power because it is not a *proper* use of federal power.⁹⁴ This assertion, of course, begs the question: Why is commandeering improper? Certainly nothing in the Constitution's text indicates that it is.

The Court in *New York* relied heavily upon the historical sequence of events that led to the ratification of the Constitution to support its position that commandeering is unconstitutional.⁹⁵ The Court observed that, under the Articles of Confederation, Congress generally lacked the power to govern the people directly.⁹⁶ Instead, federal power was exercised upon the States, which in turn exercised power over the people according to the federal mandate. The founders of the Constitution saw this mode of governmental action—national power exercised through the intermediary authority of the States—as a major defect of the national government under the Articles.⁹⁷ Alexander Hamilton noted, "[W]e must extend the authority of the Union to the persons of the citizens—the only proper objects of government."⁹⁸

Ultimately, Hamilton and the federalists prevailed. The States ratified the Constitution, ceding some direct lawmaking authority to the national government. According to the Court, at the same time the States granted to the national government this power to regulate individuals directly, they simultaneously withdrew the power to

93. *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

94. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997) (quoting U.S. CONST. art. I, § 8, cl. 18).

95. *See New York*, 505 U.S. at 163-66.

96. *See id.* at 163.

97. *See id.*

98. THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

regulate individuals indirectly through the States.⁹⁹ But the historical evidence supporting the Court's view is marginal at best. The Court relies on several quotations taken from the debates on the Constitution¹⁰⁰ but neglects to mention Hamilton's clear statements to the contrary in the Federalist Papers:

The [Constitution], by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of *each* in the execution of its laws.... Thus the *legislatures*, courts, and magistrates, of the respective members will be incorporated into the operations of the national government... and will be rendered auxiliary to the enforcement of its laws.¹⁰¹

An objective analysis reveals that the Constitution's history simply does not support the anti-commandeering principle.

The Court has also cited precedent, implying that both *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*¹⁰² and *FERC v. Mississippi*¹⁰³ support its newfound constitutional principle.¹⁰⁴ In both cases, though, the Court upheld the statutes at issue against constitutional attack. In *Hodel*, the Court barely discussed anti-commandeering, dismissing in a single sentence the argument that the Surface Mining Control and Reclamation Act of 1977¹⁰⁵ improperly conscripted the state governments.¹⁰⁶ And in *FERC* (a case whose facts are barely distinguishable from those of *New York*) the Court

99. See *New York*, 505 U.S. at 166 ("In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

100. See *id.* at 165-66 (quoting Charles Pinckney, Rufus King, and Alexander Hamilton, among others).

101. THE FEDERALIST NO. 27, at 176-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Even the quotation of Hamilton which the *New York* Court chose to excerpt, see 505 U.S. at 163, provides ample room for debate whether the framers understood the adoption of the new power to regulate directly to occur in place of, or in addition to, the old power to regulate indirectly through the States. Hamilton said, "[W]e must extend the authority of the Union to the persons of the citizens—the only proper objects of government." THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961). By emphasizing the word "extend," one can argue that the intention was to add to the existing power. By emphasizing the word "only," one can argue to the contrary that only the citizens were meant to be objects of federal legislation.

102. 452 U.S. 264 (1981) (holding the Surface Mining Control and Reclamation Act of 1977 constitutional).

103. 456 U.S. 742 (1982) (finding the Public Utility Regulatory Policies Act of 1978 to be within the commerce power).

104. See *New York*, 505 U.S. at 161-62; *Printz*, 521 U.S. at 928-29.

105. Pub. L. No. 95-87, 91 Stat. 445.

106. See *Hodel*, 452 U.S. at 288 ("Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.").

upheld the federal Public Utility Regulatory Policies Act of 1978¹⁰⁷ ("PURPA"), which required state utility commissions to consider federally formulated "suggestions" on ways to improve their rate structures within two years of PURPA's enactment. The Court also came very close to considering and rejecting the anti-commandeering principle in a footnote.¹⁰⁸

Thus, the textual, historical, and precedential support for the anti-commandeering principle is thin at best. Under these circumstances, one might expect the Court to take pains to explain the policy justifications which warrant the principle's constitutional status.

B. Three Policy Rationales for Anti-Commandeering

In fact, the Court has evinced little interest in, and at times has demonstrated outright hostility to, the idea that it should justify anti-commandeering on the basis of the principle's real-world ramifications. In *New York*, the Court stated bluntly, "The benefits of this federal structure have been extensively cataloged elsewhere . . . but they need not concern us here. . . . The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."¹⁰⁹ This is an unfortunate position for the Court to have taken. Given the scant textual, historical, and precedential support for anti-commandeering, the Court owes us a complete explanation as to just why it has chosen to import this absolute¹¹⁰ principle into our constitutional jurisprudence.

Some discussion of the policies animating the anti-commandeering principle does appear in the *New York* and *Printz* opinions, although the Court never undertakes a considered examination of the strength of those policies and the countervailing arguments against them. A careful reading of these cases reveals three distinct rationales asserted in defense of anti-commandeering: the "accountability" rationale, the "power" rationale, and the "money" rationale. I will examine each of these in turn, concluding that none properly supports the Court's position.

1. Accountability

Under the accountability rationale, federal commandeering of

107. Pub. L. No. 95-617, 92 Stat. 3117.

108. See *FERC*, 456 U.S. at 761 n.25.

109. *New York*, 505 U.S. at 157 (citation and internal quotation omitted).

110. "We . . . conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'" *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188).

state governments causes confusion regarding which government is responsible for repugnant legislation. Where Congress legislates directly, voters unhappy with the legislation can express themselves at the ballot box. Federal officials thus bear the brunt of their own unpopular acts. On the other hand, where Congress requires the States to legislate, voters may throw out the state legislators who directly passed the unpopular program while the federal officials who devised the legislation escape unharmed.¹¹¹

I agree that there is some value to knowing which of the two governments is responsible for a particular piece of legislation. However, the accountability rationale suffers two important flaws. First, other forms of legislation, permissible under the anti-commandeering principle, cause confusion over which government is responsible to the same extent as federal legislation that commandeers the States. For example, federal exercises of the spending power that condition a State's receipt of federal funds upon the State's enactment of a particular law, are equally susceptible to the accountability argument. Second, state officials forced to enact a federal program which they believe will be unpopular will not be shy about pointing out to voters that "Washington" made them do it.¹¹² Most people knew that the fifty-five mile per hour speed limit was the work of the federal government, even though state highway patrol officers wrote out the speeding tickets.¹¹³

2. Power

Under the power rationale, the structure of the Constitution divides regulatory power between state and federal governments. This division of power between the two governments secures the liberty of the people so governed: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."¹¹⁴ Thus, the anti-commandeering principle protects the people's freedom from governmental encroachment.

Again, though, this rationale is hardly convincing. Like the

111. See *New York*, 505 U.S. at 168-69; *Printz*, 521 U.S. at 930.

112. See H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 876-77 (1999).

113. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court found the required linkage under the federal spending power of this speed limit to the States' receiving their federal highway funds.

114. *New York*, 505 U.S. at 181 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Printz*, 521 U.S. at 921 (quoting same).

accountability rationale, the power rationale applies equally to impermissible commandeering and to permissible encouragement of state governments through the use of the federal spending power. Since the anti-commandeering principle limits only the mode of action Congress chooses to operate upon the States, it is difficult to see how the principle prevents the balance of power from shifting to the national government in any realistic sense. If Congress really wants to regulate an activity, the anti-commandeering principle will rarely if ever stand in the way.¹¹⁵

Moreover, history teaches that States, and not the federal government, represent the greater threat to individual liberties in this country. Centuries of institutional slavery, Jim Crow laws, and the more recent encroachments on free speech,¹¹⁶ freedom of religion,¹¹⁷ and reproductive rights¹¹⁸ have proven state governments to be poor protectors of our individual freedoms.¹¹⁹

3. Money

Finally, under the money rationale, a federal government unconstrained by anti-commandeering could greatly expand the reach of its regulatory activity without having to pay for the administrative oversight that is part and parcel of its regulation. As Justice Scalia pointed out in *Printz*, "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50

115. On October 9, 1999, President Clinton signed into law a measure conditioning state governments' receipt of their federal transportation funds upon their agreement not to release personal information from their Department of Motor Vehicles databases without the consent of the person whose information is to be released. See Act of Oct. 9, Pub. L. No. 106-69 § 350. The measure makes special provision for Alabama, Oklahoma, and Wisconsin, whose Driver's Privacy Protection Act lawsuits were decided by the circuit courts but are not currently pending before the Supreme Court. See *id.* One wonders whether the new law moots the question whether the DPPA is constitutional. As a practical matter, States will now obey the federal mandate (or, if you wish, the federal "encouragement") regarding release of motor vehicle records, whether the DPPA stands or falls.

116. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down state law banning flag burning); *Cohen v. California*, 403 U.S. 15 (1971) (holding that state law may not criminalize the wearing of a jacket bearing the inscription, "Fuck the Draft," merely because others might find it offensive).

117. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down a Hialeah, Florida, ordinance prohibiting ritual animal sacrifice); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (upholding Oregon law prohibiting members of Native American Church from using peyote in religious ritual).

118. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (delineating the extent to which States may impede a woman's ability to obtain an abortion).

119. See Moulton, *supra* note 112, at 904.

States.”¹²⁰ On the other side of the governmental equation, States required to subsidize the enforcement of federal laws could eventually lose the ability to allocate their scarce financial resources to projects of their citizens’ own choosing.¹²¹

I find the money rationale to be the most persuasive policy justification for the anti-commandeering principle. Chief Justice Marshall once observed that “the power to tax involves the power to destroy.”¹²² That is because governments, like the people and businesses they govern, cannot operate without money. Just as a federal tax directly saps a State of its precious financial resources, so the need to pay for federal regulation indirectly drains the State’s coffers. While federal taxes and unfunded federal regulatory programs differ in the degree of their destructive effects (the tax has the power to destroy far more quickly and directly), there is some wisdom in remaining vigilant lest federal regulation overrun state budgets.

The money rationale also differs from both the accountability rationale and the power rationale in that the money rationale does not apply equally to a conditional exercise of the federal spending power. If States find that the money offered by Congress as an inducement to pass federally favored legislation is inadequate, the States may simply refuse the federal grant. And while the federal budget is significantly larger than that of any State, it is not infinite; Congress cannot endlessly “bribe” the States into enacting all of the regulatory programs it would like to see.

However, the money rationale also suffers serious analytical weaknesses. For the last decade, the States have raised strong political opposition to unfunded federal mandates. Today, the federal political process incorporates the notion that Congress must consider the effect on state budgets of any of its programs which the States will be required to administer.¹²³ Moreover, the money rationale may or may not be present in any particular case of federal commandeering. For example, in *New York*, the federal laws at issue raised no concerns of federal regulation at state expense. Congress there simply acted as a broker of the agreements made among the States themselves and passed the laws at issue to enforce the State-made compacts.¹²⁴

120. *Printz v. United States*, 521 U.S. 898, 922 (1997).

121. *See New York v. United States*, 505 U.S. 144, 168 (1992).

122. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

123. This is precisely the procedural protection of the States in the national political process which *Garcia* envisioned. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54 (1985).

124. *See New York*, 505 U.S. at 151-52.

The money rationale cannot alone bear the weight of the anti-commandeering principle. The Court's asserted policy justifications for the principle simply do not support reading into the Constitution such a categorical rule.

C. The Case Against Anti-Commandeering

While the policy justifications offered by the Court fail to properly support the anti-commandeering principle, these justifications tell only half the story. As Professor Moulton points out, federalism seeks a balance of power between the national and local governments. Maintaining that balance entails not only protecting the States from abuses of federal power but also empowering the federal government to act when action is appropriate. "After all, American federalism was invented as a means of creating a more effective (and necessarily more powerful) national government than existed under the Articles of Confederation."¹²⁵

The risk that judicially enforced limits on national power will impede the proper functioning of the nation is more than theoretical. In the 1930s, the Court's refusal to allow the commerce power to expand in tandem with the national economy prolonged the Great Depression and nearly precipitated a constitutional crisis.¹²⁶ It seems unlikely the anti-commandeering principle could cause comparable disruption. However, since the Court's decisions in *New York, Printz*, and *Lopez*,¹²⁷ the lower federal courts have been flooded with litigation attempting to invalidate various congressional enactments on federalism grounds.¹²⁸

125. Moulton, *supra* note 112, at 852.

126. See GUNTHER & SULLIVAN, *supra* note 18, at 183-85 (discussing President Roosevelt's "Court-packing" plan).

127. *United States v. Lopez*, 514 U.S. 549 (1995), struck down the Gun-Free School Zones Act of 1990, the first U.S. Supreme Court case since 1937 to find a federal law outside the reach of the commerce power.

128. See, e.g., *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 826 (4th Cir. 1999) (finding Congress's creation of private cause of action under the Violence Against Women Act not within commerce power); *United States v. Mack*, 164 F.3d 467, 473 (9th Cir. 1999) (holding that federal law prohibiting possession of handguns with obliterated serial numbers does not violate state sovereignty); *United States v. Wilson*, 159 F.3d 280, 287-88 (7th Cir. 1998) (upholding federal prohibition against firearm possession in interstate commerce while subject to protective order against Tenth Amendment challenge); *Association of Community Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836-37 (6th Cir. 1997) (finding that National Voter Registration Act does not violate Tenth Amendment); *Thompson v. Colorado*, 29 F. Supp. 1226, 1238 (D. Colo. 1998) (sustaining Title II of Americans with Disabilities Act against Tenth Amendment challenge). Consider also that four district courts and four circuit courts have now been dragged into the federalism fray solely over the question whether the Driver's Privacy Protection Act is

Thus, the anti-commandeering principle does not hold the solution to the federalism problem. Constitutional text, history, and precedent provide little support for the principle, and its policy rationales are inadequate to justify its wholesale importation into our federal constitutional jurisprudence.

D. A Distinction Without a Difference

Even if, however, one accepts the validity of the anti-commandeering principle, I would still question one aspect of the Court's jurisprudence under the principle. In *New York*, the Court drew a sharp distinction between two types of Tenth Amendment cases. One type concerned Congress's authority to regulate the States under generally applicable laws. The other concerned Congress's authority to encourage or compel the States to regulate private parties in a particular way.¹²⁹ The five-member majority in *Printz* reaffirmed the Court's commitment to that distinction.¹³⁰ The Court has indicated that it intends to analyze these two classes of cases under entirely different standards and precedents.¹³¹

I fail to see the virtue in the distinction, even if one accepts the validity of the anti-commandeering principle. If Congress has regulated the States in a manner which offends the balance of federal-state power set forth in the Constitution, it is difficult to understand how the application of those same laws to private parties cures the constitutional defect. Conversely, if federal regulation of the States falls within the permissible range, I see no reason to require that the law also apply to private parties in order that it may withstand constitutional challenge.¹³² The Driver's Privacy Protection Act must be judged on whether Congress has exceeded its constitutional authority in passing the Act, and not on whether banks, insurance companies, and other private purveyors of databases must comply with the same or similar laws.

In *Travis*,¹³³ Judge Easterbrook attempted to justify the separate treatment of the two types of federal regulation of the States as an outgrowth of the intergovernmental tax immunity doctrine first

constitutional. See *supra* note 7.

129. See *New York*, 505 U.S. at 160-61.

130. See *Printz*, 521 U.S. at 932.

131. See *New York*, 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."); *Printz*, 521 U.S. at 932. See also *FERC v. Mississippi*, 456 U.S. 742, 758-59 (1982) (recognizing the distinction without explaining why it is relevant).

132. I am not the first to recognize the analytical weakness of the distinction. See *New York*, 505 U.S. at 201-02 (White, J., concurring in part and dissenting in part).

133. *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998).

established in Chief Justice Marshall's time.¹³⁴ It is now well-established, for example, that the federal government may not directly impose a tax upon the States that is greater than the tax it imposes upon private parties engaging in the same conduct.¹³⁵ Judge Easterbrook suggested that the rationale behind this rule ought also to restrict the federal government's constitutional authority to *regulate* the States.¹³⁶ Under this theory, Congress could only regulate state governments with respect to a particular activity to the extent it also regulated private parties engaging in the activity.

The extension of the immunity doctrine from taxes to regulation fails, however, because taxing and regulating are fundamentally different. The governing body's incentive to tax is always stronger than its incentive to regulate. Taxes confer benefits on the taxpayer and impose burdens upon the one taxed, while regulations impose burdens upon both the regulator and the one regulated. Specifically, any tax Congress imposes results in a greater number of dollars in the federal treasury, while mere congressional regulation costs the federal government money—in the administration and enforcement of the new law. Congress might attempt to tax the States merely to raise revenue, but the federal government would not gratuitously impose upon itself the administrative costs and burdens of regulating the States.¹³⁷

Accordingly, I see no plausible reason for the disparate treatment the Court accords federal laws directed solely at the States, as opposed to generally applicable laws which incidentally apply to the States. The Court should abandon this needless distinction at the earliest opportunity.

Conclusion

Four States in four different circuits have challenged the Driver's Privacy Protection Act as an unconstitutional commandeering of the States' Departments of Motor Vehicles. Two circuits have held that the Act presents no constitutional problem, while two others have declared it unconstitutional.¹³⁸ Later this term, the Supreme Court will decide whether the Act stands or falls.

In Part II above, I explained why the Court should uphold the

134. *See id.* at 1002-03.

135. *See South Carolina v. Baker*, 485 U.S. 505, 515-27 (1988).

136. *See Travis*, 163 F.3d at 1002 (emphasis added).

137. In addition, a tax generally imposes a greater burden upon its object than does a regulation. For example, States will bear only slight financial burdens in amending the administrative procedures followed by their Departments of Motor Vehicles in order to comply with the DPPA.

138. *See supra* note 15.

Act. Unlike the regulation of low-level radioactive waste at issue in *New York v. United States*¹³⁹ or the interim handgun provision at issue in *Printz v. United States*¹⁴⁰, the Act does not use the States as implementing agents of a federal regulatory program. Instead, the Act directly regulates the States, requiring certain actions and forbidding others. Accordingly, the Act does not unconstitutionally commandeer the state governments; like any valid federal law, it simply demands compliance.

In Part III, I explored the underpinnings of the anti-commandeering principle, which has animated the last decade of the Court's Tenth Amendment jurisprudence. I found no satisfying justification for the principle. The principle lacks substantial support in constitutional text, history, or pre-*New York* precedent. Moreover, the policy justifications the Court has articulated in defense of anti-commandeering are susceptible to powerful counterarguments. Given this state of affairs, it is startling that the Court has adopted anti-commandeering as an absolute constitutional prohibition.

Rebecca Schaeffer's murder was a tragic event, made possible by easy access to the personal information contained in her DMV records. And while state governments were slow to restrict that access, Congress passed the Driver's Privacy Protection Act. It seems that federalism—the idea that two separate governments should exercise concurrent regulatory authority over us—has one additional benefit. When we need a law passed, we have two places to which we can turn.

139. 505 U.S. 144 (1992)

140. 521 U.S. 898 (1997)

